Filed 6/30/09 P. v. Stidham CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENNETH JEROME STIDHAM, Defendant and Appellant.	E046051 (Super.Ct.No. FCF1932) OPINION

APPEAL from the Superior Court of San Bernardino County. David S. Cohn, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr. and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Kenneth Jerome Stidham appeals from judgment entered following jury convictions for five counts of committing a lewd act upon a child (Pen. Code, § 288,

subd. (a)).[1] The court sentenced defendant to a total term of 10 years in prison, consisting of consecutive two-year terms (one third the mid term) for each of the five offenses.

Defendant contends the trial court erred in failing to instruct sua sponte the jury on former section 803, subdivision (g),[2] which extends the applicable six-year limitations period for prosecuting the charged offenses. Defendant also contends that imposing residency restrictions on him under section 3003.5 violates state and federal constitutional ex post facto laws.

We reject defendant's contentions and affirm the judgment.

1. Facts

John Doe, born in May 1988, lived with his parents in Crestline from the time he was five or six years old, until he was nine years old. During that time, defendant lived nearby, down the street. Doe played with defendant's children.

Doe testified at trial that one day, while Doe was watching television at defendant's house, defendant played a pornographic movie and sat next to Doe. No one else was home. Defendant began touching Doe's penis. This was the first time defendant molested Doe. Doe was about six years old then. After this, on multiple occasions defendant touched Doe's penis and had Doe touch defendant's. At least three

[1] Unless otherwise noted, all statutory references are to the Penal Code.

[2] In 2005, former subdivision (g) of section 803 was redesignated and remains currently named as subdivision (f). References in this opinion to section 803(g) are to the former version of section 803, subdivision (g), in effect when defendant's crimes were reported and charged in 2003.

times defendant also put his penis in Doe's anus. The incidents occurred at defendant's house, with the exception of one incident. The molestation happened often, whenever it was convenient.

Doe moved away from Crestline in 1997, when he was nine years old. Doe's parents divorced when Doe was around 13 years old (around 2001). Doe had problems in school and engaged in cutting himself and purging. When Doe was a junior in high school, he came to school under the influence of drugs.

Doe never told anyone defendant had molested him until 2003, when he was 15 years old. Doe first told his church youth pastor and then Sergeant Lupear. Lupear asked Doe to write a letter to defendant. In the letter dated March 27, 2003, Doe stated: "Do you remember when I was little, and what you did to me? Well, I have been thinking of that a lot lately, and wondering why did you do that? . . . [P]lease write back as soon as possible, with the answers[.]"

Doe received a letter from defendant in April, stating: "You asked me a 'why' question, and the only 'why' that I can think of is that it seemed to be what the situation called for. It seemed to me at the time to be what you wanted from me. Was I wrong? I don't know, probably. It certainly wasn't the wisest thing to do, but, like I said, I'm an idiot. Did I mean to cause you pain or problems? No[,] not ever. Do I have any excuses? Other than poor judgement, being high on drugs, and not being able to sa[*sic*] no to some one[*sic*] that I care about, no, not really."

Lupear testified he interviewed Doe on March 27, 2003. Doe stated that about a year after he moved to Crestline, defendant began molesting him. He was in the first or

second grade. The first time defendant molested Doe in Doe's bedroom and defendant touched Doe's penis and had Doe touch defendant's. Then defendant sodomized Doe. Doe described another similar incident that occurred in defendant's bathroom. Doe told Lupear the sodomy occurred approximately once a week for two to three years. This would have been between 1995 and 1997.

Lupear interviewed defendant on May 1, 2003. Initially, defendant denied committing any sexual acts with Doe. Eventually, defendant admitted that on one occasion, while defendant was at his house lying on the couch, Doe crawled on top of defendant and began hugging defendant and rubbing defendant's chest. Defendant claimed Doe put his hand down defendant's pants and began playing with his penis. After a while Doe stopped and sat on the floor.

Defendant also told Lupear about another incident which occurred in defendant's bathroom. While defendant was in the bathroom, Doe came in and closed the door. According to defendant, he told Doe to go away and Doe refused. Doe pulled down his own pants and fondled defendant's penis. Then Doe pulled up his pants and left the bathroom. Defendant said this happened on two or three occasions. On one of these occasions, Doe pulled down his own pants and sat on defendant's lap in the bathroom. On another occasion, defendant masturbated Doe in Doe's bedroom. Defendant denied sodomizing Doe.

Defendant stated that there had been four to six incidents of touching between him and Doe. Defendant did not stop Doe from touching him because defendant was trying to validate Doe's feelings and show him closeness.

Public Defender Investigator Gary Haidet interviewed defendant three times, on March 19 and 20, 2007, and April 9, 2007. Doe discussed the molestations and that they occurred at defendant's and Doe's homes.

Defendant testified he met Doe's family during the summer of 1995, and moved away from Crestline in June 1997. Defendant claimed that when he received Doe's letter, defendant was confused because it referred to something he had not done. Defendant claimed that during the incident on the couch, defendant awoke to find Doe "dry humping" him. Defendant told Doe stop. Defendant claimed there had never been any inappropriate touching by either of them.

Defendant recalled an incident in his bathroom, during which he was wrapped in a towel, about to take a shower when Doe asked him to sit down nearby while Doe went to the bathroom. After going to the bathroom, Doe presented his bare backside to defendant. Defendant thought maybe Doe was asking if he had "wiped sufficiently." Defendant got up and left the bathroom. Doe did not sit on defendant's lap, although he may have gotten to defendant's knees. Defendant also denied ever sodomizing Doe, and denied telling Lupear he touched Doe's penis. Defendant told Lupear that when Doe sat on defendant's lap wanting attention, Doe may have his hand on defendant's penis.

Defendant testified that on another occasion, when defendant was at Doe's house, Doe asked defendant to tuck him in and, on one occasion, Doe pulled down his blanket, put his hands on his penis, and said to defendant, "Tuck this in too." Defendant slapped Doe's hand and told him to put it away.

Defendant acknowledged that he was in prison for committing attempted murder in 1997 and residential burglary in 1999.

Defendant's wife testified she married defendant in 1989 and had four children with him. While living in Crestline, she never saw defendant interacting with Doe and did not hear of any complaints of inappropriate conduct.

Dr. Brodie, a clinical and forensic psychologist, testified that a 15 year old, who engages in cutting and purging, and has gender confusion, might fabricate sexual abuse. Clinical psychologist, Dr. Ermshar interviewed and tested defendant. She concluded defendant did not meet the criteria for a pedophile and did not have any psychological disorders.

2. Instructional Error

Defendant contends the trial court erred in failing to instruct sua sponte the jury to make the factual determinations necessary to extend the limitations period under section 803(g). Defendant argues such instruction was required because the statute of limitations extension was the functional equivalent of an element of an offense.

The crime of committing a lewd act upon a child (§ 288, subd. (a)) is subject to a six-year statute of limitations. (§ 800.) The version of section 803(g) in effect in 2003, when the People filed their felony complaint against defendant, "allowed the prosecution of specified sexual offenses against minors to be commenced within one year after Doe reported the crime to the police, even though the statute of limitations had otherwise expired, provided that '[t]he crime involved substantial sexual conduct' and there was

'independent evidence [that] clearly and convincingly corroborate[s] the victim's allegation.'" (*People v. Thomas* (2007) 146 Cal.App.4th 1278, 1284-1285 (*Thomas*).)

A. Procedural Background

Defendant reported the charged sexual offenses in 2003 and a felony complaint was filed in September 2003, within the one-year statute of limitations extension. Defendant was charged in the information with five counts of committing a lewd act (§ 288, subd.(a)) during the period of January 1995 and July 31, 1997. As to each count, the information alleged that under section 803(g) the statute of limitations had been extended.

A jury found defendant guilty of counts 1 through 5 but was not asked to make findings on whether it found true the substantial sexual conduct allegation or whether the statute of limitations extension applied.

During the trial, outside the presence of the jury, the trial court noted that it had been alleged that defendant sodomized Doe on a number of occasions and such a crime, if it occurred, constituted substantial sexual contact. The court further stated that there was not any evidence of anything occurring other than the alleged sodomy or, alternatively, simple physical gestures of affection, such as hugging. The court concluded that under such circumstances, the court would not give an instruction on the lesser included offense of assault. Both parties stated they were in agreement with this.

Defense counsel then informed the court: "Some time ago in the development of this case I made a strategic decision. There are allegations in the information regarding the statute of limitations, particularly Evidence Code 803 and Subsections. My feeling is

that it's much more credible argument to simply argue to the jury that these things did not occur rather than to argue that they might have occurred . . . [b]ut the statute has lapsed. So it's an intentional decision on my part. I have not addressed it. I don't intend to address it during closing arguments either." The court responded, "So you're waiving that as a potential defense?" Defense counsel agreed, stating he believed doing so was necessary.

During the sentencing hearing, after defendant was found guilty on all five counts, defense counsel stated that he would like to explore the possibility of filing a motion for new trial. The court noted it had received a letter from defendant, and there did not appear to be any basis for granting a new trial. The court acknowledged that it was within the discretion of defense counsel to decide whether to file such a motion, and since defense counsel believed there was a colorable issue independent counsel should examine, the court ordered the sentencing hearing continued. The court appointed the conflict attorney panel for the purpose of considering whether a motion for new trial was appropriate.

At a subsequent hearing, defendant's conflict attorney informed the court that he had reviewed the record and concluded there were no grounds for a new trial. The attorney noted that defendant's trial attorney made a strategic decision not to argue to the jury the statute of limitations issue. According to conflict counsel, defendant still wanted to pursue the statute of limitations issue even though conflict counsel advised him that in his opinion there were no grounds for a new trial based on attorney incompetence. The court thus relieved the conflict panel of representation of defendant.

Defendant told the court he nevertheless believed he had substantial grounds for bringing a motion for new trial but had not had a chance to discuss it with anyone else. The court continued the matter. At the next hearing, during which defendant was represented by his former trial attorney, defendant told the court he believed that the charges against him were barred by the statute of limitations because the one-year extension under section 803(g) did not apply.

The prosecutor responded that the requirements of section 803(g) were established at trial. There was evidence of substantial sexual contact by defendant, consisting of numerous incidents of sodomy. There was also corroborating evidence, consisting of defendant's investigative statement to Detective Lupear.

The court concluded that regardless of whether the statute of limitations extension was established at trial, the issue was not properly before the court and therefore the court proceeded with sentencing.

B. Waiver

The prosecution argues defendant expressly waived his objection to the court not instructing sua sponte on the statute of limitations extension since, at the time of the sentencing hearing, defense counsel told the court that defendant was not requesting instruction on the statute of limitations because it would be inconsistent with the defense.

In *Thomas, supra*, 146 Cal.App.4th 1278, a sexual abuse case, the court held that the defendant forfeited his objection to the trial court not instructing the jury sua sponte on the statute of limitations extension under section 803(g). (*Id.* at p. 1289.) The court explained that there was no sua sponte duty because the prosecution filed a charging

document that was not time-barred on its face. The information included allegations rendering the action timely by alleging the section 803(g) statute of limitations extension applied. (*Ibid.*) As a consequence, "[d]efendant had early and specific notice that the applicability of the former section 803, subdivision (g) limitations extension was at issue. Allowing defendant to raise the statute of limitations for the first time on appeal would be a disincentive for the parties to focus on the issue at trial, where an adequate factual record can be developed." (*Ibid.*.)

The *Thomas* court further noted that, "where the information is facially adequate due to an alleged extension of the limitations period, a defendant claiming ineffective assistance would have to show a reasonable probability of success on the factual issue to prevail. [Citation.] As we discuss below, defendant was not prejudiced by counsel's failure to raise the statute of limitations and he does not have a meritorious claim of ineffective assistance of counsel." (*Thomas, supra,* 146 Cal.App.4th at p. 1289.)

Here, as in *Thomas,* the prosecution filed a charging document that was not time-barred on its face. The information included allegations rendering the action timely by alleging the section 803(g) statute of limitations extension applied. (*Thomas, supra,* 146 Cal.App.4th at p. 1289.) The information thus was facially adequate due to an alleged extension of the limitations period. (*Ibid.*)

Furthermore, there is even stronger rationale than in *Thomas* for rejecting defendant's jury instruction challenge. Defendant expressly waived any such instructional error by defense counsel informing the court that defendant did not want instruction on the statute of limitations for tactical reasons. "Although the loss of the

right to challenge a ruling on appeal because of the failure to object in the trial court is often referred to as a 'waiver,' the correct legal term for the loss of a right based on failure to timely assert it is 'forfeiture,' because a person who fails to preserve a claim forfeits that claim. In contrast, a waiver is the 'intentional relinquishment or abandonment of a known right.'" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

In the instant case, not only did defense counsel not object during the trial to omission of instruction on the statute of limitations extension, but more significantly, defense counsel informed the court that defendant did not want such instruction for tactical reasons because it might detract from or weaken defendant's defense that he did not commit the charged crimes.

Defendant argues that he did not waive the instructional error challenge. We disagree. Although he personally raised it in the trial court, he did not do so until after the trial, during the sentencing hearing. As a consequence, it was too late to rectify any instructional error. In addition, during the trial, his trial attorney had already expressly waived any objection to not instructing on the statute of limitations. As noted in *People v. Linder* (2006) 139 Cal.App.4th 75, "Where the pleadings do not show as a matter of law the prosecution is time-barred, the statute of limitations becomes an issue for the jury (trier of fact) if disputed by the defendant." (*Id.* at p. 84.) Here, the pleadings did not show as a matter of law the prosecution was time-barred and defendant did not dispute the statute of limitations. The statute of limitations was thus not an issue for the jury and, in turn, the court was not required to instruct on it.

The record shows that defendant did not place the applicability of the tolling statute at issue as a factual matter at trial. We conclude, therefore, that the trial court had no duty to instruct on the required elements of section 803(g).

C. Ineffective Assistance of Counsel

Defendant further argues that, unlike in *Thomas, supra,* 146 Cal.App.4th 1278, he has a meritorious claim of ineffective assistance of counsel (IAC) due to his attorney's tactical decision to request the court not to give any instruction on the statute of limitations. (*Id.* at p. 1289.) Defendant claims his trial attorney's tactical choice not to forego instruction on the statute of limitations extension was not reasonable. Defendant further argues he was prejudiced by omission of such instruction.

We disagree. "To demonstrate ineffective assistance of counsel, a defendant must show that counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) To establish prejudice, a defendant must show a reasonable probability that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. (*Id.* at p. 694.)" (*People v. Burgener* (2003) 29 Cal.4th 833, 880 (*Burgener*).)

As to the first element of IAC, the record establishes that defendant's trial attorney made a tactical choice to forego instruction on the statute of limitation. Defendant has not shown that counsel's action was both deficient under prevailing professional norms and prejudicial. (*Burgener, supra,* 29 Cal.4th at p. 880.) The trial court appointed a conflict panel attorney to evaluate whether defendant's trial attorney provided ineffective representation in this regard, and the conflict attorney concluded there was no IAC.

Defendant also has not shown he was prejudiced by his attorney's failure to request instruction on the statute of limitations. There was overwhelming evidence that the statute of limitations extension under section 803(g) applied. Under section 803(g), the required elements include that (1) the victim reported the crime to a law enforcement agency, (2) the crime involved substantial sexual conduct, as described in section 1203.066, subdivision (b), (3) independent evidence corroborated the victim's allegation, and (4) the prosecution began within a year of the victim's report. (See *Thomas, supra,* 146 Cal.App.4th at pp. 1284-1285; *People v. Linder, supra,* 139 Cal.App.4th at p. 81.)

Defendant argues it is likely the jury convicted defendant based on acts that did not constitute "substantial sexual conduct" and therefore, had the jury been instructed on the statute of limitations extension, it would have found the charges were barred by the statute of limitations.

Section 1203.066, subdivision (b) defines "substantial sexual conduct" as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." (§ 1203.066, subd. (b).)

Here, Doe testified defendant molested him on multiple occasions, whenever it was convenient. Defendant sodomized Doe at least three times. When defendant molested Doe, it was the same. Defendant molested Doe weekly, from 1995 through mid-1997, beginning when Doe was about six years old, and ending when Doe was nine. Lupear testified Doe told him defendant sodomized Doe approximately once a week for two to three years, between 1995 and 1997.

Corroborating evidence included Doe's investigative statements to Lupear and Haidet; Lupear and Haidet's testimony regarding Doe's statements; Doe's letter sent to defendant and defendant's written response; and defendant's testimony describing his various acts of a sexual nature involving Doe.

Although defendant denied committing sodomy, he admitted various acts of a sexual nature had occurred between him and Doe. Defendant testified Doe "dry humped" defendant on the couch and, while defendant was in the bathroom wrapped in a towel, about to take a shower, Doe exposed his bare buttocks to defendant. Defendant said that, in the process of then attempting to sit on defendant's lap, Doe "may have made it as far as getting to [defendant's] knees." Defendant also told Lupear that on those occasions when Doe sat on defendant's lap wanting attention, Doe may have put his hand on defendant's penis. Defendant testified that on one occasion when defendant was at Doe's house tucking Doe in bed, Doe exposed his penis to defendant, and defendant told him to "put it away."

The jury could reasonably conclude from defendant's testimony that defendant did not fully disclose his sexual involvement with Doe. Defendant's testimony, in conjunction with other evidence that defendant sodomized Doe, supported a reasonable inference that defendant engaged in substantial sexual conduct with Doe.

Furthermore, the jury verdict reflects that the jury rejected defendant's account and believed Doe. Doe's testimony and statements given to Lupear regarding defendant's conduct provide strong evidence that defendant engaged in substantial sexual conduct with Doe. It therefore is not reasonably probable that, had the court instructed

on the statute of limitations, the jury would have found there was no substantial sexual conduct and therefore the statute of limitations exception did not apply. Defendant has thus failed to establish IAC since there was no prejudice in counsel waiving instruction on the statute of limitations extension.

3. Ex Post Facto Law

As a consequence of defendant's convictions for committing sexual offenses (§ 288(a)), he is required to register as a sex offender under section 290, subdivision (c). Defendant contends section 3003.5, which contains residency restrictions for sex offenders, constitutes an improper ex post facto law as applied to defendant. This issue is not ripe for review in the instant case because defendant is in custody, and will be for some time. Furthermore, the issue is pending before the California Supreme Court on habeas corpus in another case, *In re E.J.*, S156933.

In November 2006, voters approved Proposition 83, The Sexual Predator Punishment and Control Act (SPPCA), commonly known as Jessica's Law. The law, which went into effect on November 8, 2006 (Cal.Const., art. II, § 10(a)), resulted in the addition of subdivision (b) to section 3003.5. Subdivision (b), states: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

This provision, imposing residency restrictions, was enacted after defendant committed the charged crimes during the period of 1995 through July 1997. Regardless of whether the residency restriction provision, section 3003.5, subdivision (b), constitutes

an improper ex post facto law as applied to defendant, we decline to address the constitutional issue because it is not ripe for judicial review and is currently before the California Supreme Court in another case.

The issue is not ripe for determination in this case because defendant is in prison, and must remain there until he has completed his prison terms for first degree residential burglary and attempted murder, and thereafter his consecutive 10-year prison term imposed for the convictions in the instant case. Principles of judicial self-restraint require us to avoid deciding a case on constitutional grounds unless absolutely necessary. (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 671.) A controversy is not ripe for adjudication until it is "'"'definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" [Citations.]' [Citation.]" (*Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556, 562.)

Determination of the instant constitutional issue concerning the constitutionality of imposing residency restrictions on defendant is not necessary at this time, and may not be an issue in the future, depending on when and if defendant is released from custody, and where defendant chooses to live. (*PG & E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1217.)

4. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.